

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

In the Matter of the Application of)
COMTEL TELCOM ASSETS LP)
and)
VARTEC TELECOM, INC. and)
EXCEL TELECOMMUNICATIONS, INC.)
For Approval of a Transfer of)
Assets.)
_____)

DOCKET NO. 05-0298

DECISION AND ORDER NO. 22465

Filed May 15, 2006
At 1:30 o'clock P.M.

Karen Higashi
Chief Clerk of the Commission

ATTEST: A True Copy
KAREN HIGASHI
Chief Clerk, Public Utilities
Commission, State of Hawaii.

K. Higashi

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Docket No. 05-0298
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DECISION AND ORDER

By this Decision and Order, the commission grants the request by COMTEL TELCOM ASSETS LP ("Comtel") for a certificate of authority ("COA") to operate as a reseller and facilities-based provider of telecommunications services in the State of Hawaii ("State"), subject to certain regulatory requirements. In addition, the commission waives the requirements of Hawaii Revised Statutes ("HRS") §§ 269-7(a), 269-19 and 269-17, and Hawaii Administrative Rules ("HAR") §§ 6-61-101 and 6-61-105, to the extent applicable, in approving Comtel's request to complete the acquisition by Comtel of certain assets of VARTEC TELECOM, INC. ("VarTec") and EXCEL TELECOMMUNICATIONS, INC. ("Excel") (together with VarTec, the "VarTec Companies") (collectively with Comtel, the "Applicants").¹

¹Joint Application for Consent to Transfer Assets, filed November 25, 2005, as supplemented by letter dated April 20, 2006 ("April 20, 2006 Letter") (collectively, "Application"). On November 25, 2005, Applicants served a copy of the Application on

I.

Background

A.

Description of Subject Entities

Comtel is a newly formed limited partnership, organized under the laws of the State of Texas, whose principal business will be telecommunications.² The VarTec Companies are privately held corporations organized under the laws of the State of Texas, with their principal offices in Carrollton, Texas.³ Both VarTec and Excel are authorized by the commission to operate as facilities-based carriers and resellers of intrastate telecommunications services in the State.⁴ VarTec is authorized

the DIVISION OF CONSUMER ADVOCACY, DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS ("Consumer Advocate").

²Comtel's general partner, Comtel Assets Inc. ("Comtel Inc."), is a Texas corporation which owns one percent (1%) of the equity of Comtel. Comtel's limited partner, Comtel Assets Corp. ("Comtel Corp.") is a Delaware corporation, which owns ninety-nine percent (99%) of the equity of Comtel. Comtel Inc. and Comtel Corp. are corporate holding companies located in Boston, Massachusetts. Comtel Inc. and Comtel Corp. are wholly owned by Sowood Commodity Partners Fund III LP ("Sowood"). Sowood in turn, is owned by various other investment and holding companies and individuals. See Exhibit B to the Application.

³VarTec is the indirect sole owner of Excel via various Delaware holding companies.

⁴VarTec obtained its authority from the commission to provide resold telecommunications services in the State pursuant to Decision and Order No. 18165, filed on October 30, 2000, in Docket No. 00-0320, and authority to operate as a facilities-based provider pursuant to Decision and Order No. 19244, filed on March 12, 2002, in Docket No. 01-0450. Excel obtained authority from the commission to operate as a reseller of telecommunications services in the State in Decision and Order No. 15551, filed on June 27, 1997, in Docket No. 97-0098, and as a facilities-based provider pursuant to Decision and Order No. 19311, filed on April 19, 2002, in Docket No. 02-0026.

by the commission to provide long distance service to Hawaii consumers under the trade name Clear Choice Communications. Applicants represent that the VarTec Companies are additionally authorized to provide local exchange, long distance, operator and wireless services within and throughout the United States.

Applicants represent that the VarTec Companies voluntarily filed for Chapter 11 bankruptcy on November 1, 2004, in the Dallas Division of the United States Bankruptcy Court for the Northern District of Texas (the "Bankruptcy Court"). As part of the bankruptcy process, the VarTec Companies have entered into an Asset Purchase Agreement ("Purchase Agreement") with Comtel Investments LLC ("Comtel Investments"),⁵ subject to the necessary regulatory approvals, for Comtel to essentially acquire all of the assets of the VarTec Companies, as discussed more fully below.

B.

Application

On November 25, 2005, Comtel and the VarTec Companies jointly filed their Application seeking commission approval to consummate a transaction whereby Comtel will ultimately acquire substantially all of the assets of the VarTec Companies, including all telecommunications equipment, customer accounts and

⁵Comtel Investments is wholly owned by the same parties who own and control Comtel. Comtel Investments has assigned its rights and obligations under the Purchase Agreement to Comtel as of August 1, 2005. The Purchase Agreement was approved by the Bankruptcy Court on July 27, 2005.

records, business records and licenses and permits ("Proposed Transaction"). The Purchase Agreement provides that the Proposed Transaction is subject to receipt of the necessary regulatory approvals, including commission approval of this Application.

To assist in accomplishing the Proposed Transaction, Comtel represents that it may obtain, as necessary, up to approximately \$10 million in debt financing, pending consummation of the proposed transaction, to fund working capital and similar needs for the VarTec Companies ("Proposed Debt Financing").⁶ Upon consummation of the Proposed Transaction, Comtel intends to replace such Proposed Debt Financing with a three (3) to five (5) year term debt instrument. Comtel anticipates that the term debt will be approximately \$50 million. Applicants state that the Proposed Debt Financing will assist with the day-to-day operations of Comtel as it consummates its acquisition of the VarTec Companies' operations.

Applicants also request that upon approval of the Proposed Transaction, the COAs of the VarTec Companies "be transferred from the VarTec Companies to Comtel [and] in the event that the [c]ommission requires new certifications for Comtel, Comtel requests that those be issued."⁷ Comtel requests that its authority include the right to provide telecommunications services under the trade names VarTec Telecom, Clear Choice Communications, Excel Telecommunications and VarTec Solutions, in addition to the Comtel name.

⁶Application at 6.

⁷Id. at 7.

Applicants also request a waiver of all applicable anti-slamming regulations that may be considered to have been violated by the Proposed Transaction being made without the specific authorization and verification of each affected customer.⁸

Applicants assert that the Proposed Transaction will "serve the public, convenience and necessity by enabling the seamless continuation of telecommunications services to the VarTec Companies' existing Hawaii customers."⁹ Applicants further assert that granting Comtel commission authorization to provide telecommunications services in the State will "serve the public interest by stimulating increased competition in the telecommunications market."¹⁰ Additionally, Comtel represents that it "can step into the shoes of the VarTec Companies, and the residential and commercial customers previously served by the VarTec Companies will continue to receive services without interruption."¹¹

C.

Consumer Advocate's Statement of Position

On January 24, 2006, the Consumer Advocate filed its Statement of Position ("CA's Statement of Position") stating that

⁸The commission's anti-slamming provisions are set forth in HRS § 269-16.92 and HAR § 6-80-129.

⁹Application at 8-9.

¹⁰Id. at 9.

¹¹Id. at 6.

it does not object to the approval of the Application. The Consumer Advocate recommends, however, that Comtel be required to: (1) provide a copy of financial statements to demonstrate Comtel's financial fitness should the Purchase Agreement be approved¹²; (2) submit new tariffs with the Comtel name; and (3) identify the name of the entity providing service on all customer communication to mitigate any confusion as to the identity of the telecommunications service provider.¹³ Moreover, with regard to Comtel's request to waive any applicable anti-slamming provisions, while the Consumer Advocate does not object to this request, it recommends that upon consummation of the Proposed Transaction, the VarTec Companies be required to notify each of their customers of the plans to terminate service under the VarTec Companies' name and use the Comtel name, within sixty (60) days after the close of the Proposed Transaction.

¹²On April 28, 2006, Comtel submitted copies of its financial statements for commission review.

¹³The Consumer Advocate recommended that Comtel be required to provide evidence of its authorization to do business in the State from the Department of Commerce and Consumer Affairs. On April 25, 2006, Comtel filed with the commission a copy of its certificate of authority to do business in the State, along with trade name registration approvals for VarTec Telecom, Clear Choice Communications, Excel Telecommunications and VarTec Solutions.

II.

Discussion

A.

Request for Certificate of Authority

HRS § 269-7.5 prohibits a public utility from commencing business in the State without first obtaining a certificate of public convenience and necessity ("CPCN") from the commission.¹⁴ HAR § 6-80-18(a) states that:

The commission shall issue a certificate of authority to any qualified applicant, authorizing the whole or any part of the telecommunications service covered by the application, if it finds that:

- (1) The applicant possesses sufficient technical, financial, and managerial resources and abilities to provide the proposed telecommunications service in the State;
- (2) The applicant is fit, willing, and able to properly perform the proposed telecommunications service and to conform to the terms, conditions, and rules prescribed or adopted by the commission; and
- (3) The proposed telecommunications service is, or will be, in the public interest.

Upon review of the Application, the commission makes the following findings pursuant to HAR § 6-80-18(a):

1. Comtel possesses sufficient technical, financial, and managerial resources and abilities to provide the proposed services, as evidenced by the resumes of Comtel's corporate officers and the financial statements submitted in support of its Application.

¹⁴On June 3, 1996, HAR chapter 6-80 took effect. Chapter 6-80, among other things, replaces the CPCN with a COA for telecommunications carriers, and establishes procedures for requesting and issuing a COA.

2. Comtel is fit, willing, and able to properly perform the telecommunications services proposed and to conform to the terms, conditions, and rules prescribed or adopted by the commission, as evidenced by Comtel's representations in the Application. Moreover, the commission's grant of a COA to Comtel to provide the proposed services will be conditioned upon Comtel's conformity to the terms, conditions, and rules prescribed or adopted by the commission as discussed below.

3. Comtel's proposed telecommunications services are in the public interest. The commission recognizes that additional service providers in the industry increase competition and provide the consumer with options in Hawaii's telecommunications market. As noted by the Consumer Advocate, Comtel's proposed services are in the public interest as "the existence of multiple telecommunications service providers in the Hawaii market will serve to mitigate any traditional public utility regulatory concerns."¹⁵ Based on the foregoing, the commission concludes that Comtel should be granted a COA to provide resold intrastate services in the State and to provide operator and other telecommunication services as described in its Application.

In addition, to facilitate the surrender of the VarTec Companies' COAs, the commission finds that Comtel should also (1) submit annual financial reports ("AFR"), pursuant to HAR § 6-80-91, for the years 2005 and 2006 for VarTec and Excel and

¹⁵See CA's Statement of Position at 7.

(2) pay public utility fees ("Fees") for VarTec and Excel, pursuant to HRS § 269-30.

B.

Proposed Transfer

HRS § 269-7(a) authorizes the commission to examine the condition of each public utility, its financial transactions, and "all matters of every nature affecting the relations and transactions between it and the public or persons or corporations."

HRS § 269-19 provides that no public utility corporation shall "directly or indirectly, merge or consolidate with any other public utility corporation without first having secured from the . . . commission an order authorizing it so to do." HRS § 269-19 also states: "Every such sale, lease, assignment, mortgage, disposition, encumbrance, merger, or consolidation, made other than in accordance with the order of the commission shall be void."

HRS § 269-17 authorizes a public utility corporation to issue evidences of indebtedness payable at periods of more than twelve (12) months "on securing the prior approval of the public utilities commission."

Having reviewed the record,¹⁶ the commission finds and concludes that the Proposed Transaction and Proposed Debt Financing fall under the purview of HRS §§ 269-7(a), 269-19

¹⁶The commission takes official notice of all commission records relating to Applicants, pursuant to HAR § 6-61-48.

and 269-17.¹⁷ Notwithstanding these regulatory requirements, HRS § 269-16.9 permits the commission to waive regulatory requirements applicable to telecommunications providers if it determines that competition will serve the same purpose as public interest regulation. Additionally, HAR § 6-80-135 permits the commission to waive the applicability of any of the provisions of HRS chapter 269 or any rule (except provisions of HRS § 269-34 or provisions of HAR chapter 6-80 that implement HRS § 269-34), upon a determination that a waiver is in the public interest.

The commission finds that the telecommunications services currently provided by the VarTec Companies are fully competitive, and that the VarTec Companies are non-dominant carriers in Hawaii. The commission also finds that the Proposed Transaction and associated Proposed Debt Financing are consistent with the public interest, and that competition, in this instance, will serve the same purpose as public interest regulation. Thus, the commission concludes that the applicable requirements of HRS §§ 269-7(a), 269-19 and 269-17 should be waived with regard to the matters in this docket, pursuant to HRS § 269-16.9(e) and

¹⁷The commission notes that the Proposed Debt Financing is critical to the funding of the Proposed Transaction. See Application at 6. The commission also notes that Comtel did not seek commission approval for the Proposed Debt Financing. See also CA's Statement of Position at 9. In its Statement of Position, the Consumer Advocate recommends that the commission either (1) advise Comtel of the need to obtain commission approval pursuant to HRS § 269-17 prior to the issuance of securities or (2) obtain a waiver from the commission of such approval pursuant to the provisions of HRS § 269-16.9. Id. Accordingly, in this instance, the commission will, *sua sponte*, treat Comtel's Proposed Debt Financing as a request for approval, pursuant to HRS § 269-17 and proceed with its analysis pursuant to the waiver provisions of HRS § 269-16.9(e).

HAR § 6-80-135.¹⁸ Similarly, based on these findings and conclusions stated above, the commission will also waive the provisions of HAR §§ 6-61-101 and 6-61-105, to the extent that Applicants' Application fails to meet any of these filing requirements.

In addition, the commission finds that notification by the VarTec Companies to its customers of the change in service provider, as recommended by the Consumer Advocate, will afford customers an opportunity to select a new service provider, should the customer decide to do so. Accordingly, the commission concludes that within sixty (60) days of the close of the Proposed Transaction, the VarTec Companies should provide notice to its customers of their plans to terminate service, and the change in service provider pursuant to the Purchase Agreement with Comtel.

¹⁸The commission will continue to examine each application or petition and make determinations on a case-by-case basis as to whether the applicable requirements of HRS §§ 269-7(a), 269-19 and 269-17 should be waived. The commission's determination, in the instant case, of the applicability of HRS §§ 269-7(a), 269-19 and 269-17 is based on our review of Applicants' Application. Thus, the commission's waiver in this instance of the applicability of these provisions should not be construed by any public utility, including Applicants, as a basis for not filing an application or petition regarding similar transactions that fall within the purview of these statutes.

III.

Orders

THE COMMISSION ORDERS:

1. Comtel is granted a COA to operate as a facilities-based provider and reseller of intrastate telecommunications services in the State, as described in the Application.

2. As a holder of a COA, Comtel shall be subject to all applicable provisions of HRS chapter 269; HAR chapters 6-79, 6-80, and 6-81; any other applicable State laws and commission rules; and any orders that the commission may issue from time to time.

3. Comtel shall file its tariffs in accordance with HAR §§ 6-80-39 and 6-80-40. Comtel's tariffs shall comply with the provisions of HAR chapters 6-79 and 6-80. In the event of a conflict between any tariff provision and State law, State law shall prevail.

4. Comtel shall conform its initial tariff to the applicable provisions of HAR chapters 6-79 and 6-80 by, among other things, incorporating the tariff revisions required under this Decision and Order, as applicable. An original and eight (8) copies of Comtel's initial tariff shall be filed with the commission, and two (2) additional copies shall be served on the Consumer Advocate. Comtel shall ensure that the appropriate issued and effective dates are reflected in its tariffs.

5. Within thirty (30) days from the date of this Decision and Order, Comtel shall pay a public utility fee of \$60,

pursuant to HRS § 269-30. The business check shall be made payable to the Hawaii Public Utilities Commission, and sent to the commission's office at 465 S. King Street, Room #103, Honolulu, HI, 96813.

6. Within thirty (30) days from the date of this Decision and Order, Comtel shall also pay a telecommunications relay service ("TRS") contribution of \$10.00, established pursuant to: (A) Act 50, adopted on May 7, 2003 (codified as HRS § 269-16.6); and (B) Decision and Order No. 21847, filed on May 31, 2005, in Docket No. 05-0088. The business check shall be made payable to "Hawaii TRS", and sent to the Hawaii TRS Administrator, Solix, Inc.,¹⁹ 80 S. Jefferson Road, Whippany, NJ 07981. Written proof of payment shall be sent to the commission.

7. Within thirty (30) days from the date of this Decision and Order, Comtel shall file the AFRs for VarTec and Excel for the years 2005 and 2006 and pay the Fees for VarTec and Excel for the years 2005 and 2006 to facilitate surrender of the COAs of the VarTec Companies.

8. Within sixty (60) days after the close of the Proposed Transaction, the VarTec Companies shall notify its customers of its plans to terminate service under the VarTec Companies' names and use the Comtel name, pursuant to the Purchase Agreement with Comtel.

9. Failure to promptly comply with the requirements set forth in paragraphs 3 to 8, above, may constitute cause to

¹⁹Solix, Inc. was formerly known as NECA Services, Inc.

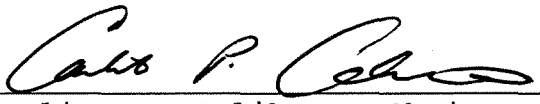
void this Decision and Order, and may result in further regulatory action, as authorized by law.

10. The requirements of HRS §§ 269-7(a), 269-19, and 269-17 to the extent applicable, are waived with respect to the Proposed Transaction and the Proposed Debt Financing.

11. The filing requirements of HAR §§ 6-61-101 and 6-61-105, to the extent applicable, are waived.

DONE at Honolulu, Hawaii MAY 15 2006.


PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

By 
Carlito P. Caliboso, Chairman

By (EXCUSED)
Wayne H. Kimura, Commissioner

By 
Janet E. Kawelo, Commissioner

APPROVED AS TO FORM:


Benedyne S. Stone
Commission Counsel

05-0298.cs

CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing Decision and Order No. 22465 upon the following parties, by causing a copy hereof to be mailed, postage prepaid, and properly addressed to each such party.

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DATED: MAY 15 2006